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Supreme Court of the United States

OCTOBER TERM 1948

No. 568

DAVID KRAKOWER,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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No.

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THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the United States:

The petitioner, David Krakower, prays that a *writ of certiorari* issue to review the judgment of the Court of Appeals of the State of New York, which, in turn, affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, affirming a judgment by the Court of General Sessions of the County of New York, convicting petitioner of the crimes of bribery (New York Penal Law, Sec. 382), and conspiracy [New York Penal Law, Sec. 580 (6)].

Statement on Jurisdiction

The jurisdiction of this Court is invoked under Section 1257 of the Revised Judicial Code. The judgment of the

Court of Appeals of the State of New York, which was a final judgment under the laws of that State, was entered on November 24, 1948.

Opinions Below

The Appellate Division of the Supreme Court wrote no opinion, but one of the concurring Justices noted that he voted to affirm "on the authority of *Harlem Check Cashing Corp'n.* v. *Bell,* 296 N. Y. 15" (273 App. Div. 874).

The Court of Appeals likewise affirmed without opinion, but with the following notation (298 N. Y. 728):

> "Judgment affirmed. Upon this appeal the following question was presented and necessarily passed upon: The appellants contended that the receipt in evidence of wire tapped telephone calls was illegal because of section 605 of the Federal Communications Act of 1934 (U. S. Code, tit. 47, Sec. 605). This court held to the contrary. (See *Matter of Harlem Check Cashing Corp.* v. *Bell,* 296 N. Y. 15.) No opinion."

Summary Statement of Matter Involved

The petitioner, with two others, was indicted and convicted of the crimes of conspiracy and bribery of participants in professional games. This prosecution, and the investigation which preceded it, was entirely based, directly and indirectly, on evidence derived by tapping telephone conversations, transcribing both interstate and intrastate messages which were thereby intercepted, and divulging the contents of these talks at the petitioner's trial.

It appears that New York City police officers, assigned to an investigation of bookmaking, tapped the telephone wires of supposed participants in illegal horse race bet-

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ting, in order to obtain evidence of such violations. The person whose wires were tapped were not defendants in the present case. The tapping was done pursuant to an *ex parte* order by a New York Supreme Court Justice, who purported to act under the authority conferred upon him by New York Constitution, Article 1, Section 12, and New York Code of Criminal Procedure, Section 813-a.[1]

The police intercepted and transcribed numerous intrastate conversations between persons in New York City, and interstate ones between persons in New York and in New Jersey. Among the conversations were a number in which one Alvin Paris participated, several in which petitioner is alleged to have participated, and others in which petitioner was mentioned. Information was derived therefrom that a plan was afoot to offer bribes to two professional football players to induce them to attempt to cause their team to lose a certain game, and thus allow the conspirators to engineer a profitable betting *coup*. Before the date of the game, Alvin Paris was arrested and charged with bribery. After a trial, in which he denied his guilt, and at which testimony of the tapped telephone conversations was introduced, he was convicted. Before sentence, and in hopes of obtaining leniency, he conferred with the prosecutor, who confronted him with additional wiretaps. Paris agreed to turn State's evidence, and testified against petitioner and his co-defendants at the trial of the latter.

At that trial, the evidence against petitioner and his co-defendants consisted of the testimony of the convicted accomplice, Paris, which was, at least indirectly, attributable to wiretapping [*cf. Nardone* v. *United States* (1939)

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1 Both the State Constitutional provision and the Criminal Code section were adopted *subsequent* to the passage of the Federal Communications Act of 1934, and its construction, for the first time, in *Nardone* v. *United States* (1937) 302 U. S. 15.

308 U. S. 338], and the corroborative testimony of Patrolman Jove, who had tapped the wires, and who introduced into evidence the notes, *in extenso,* which he had made of seventeen of the intercepted conversations (Peo's. Exhs. 5-A to 5-H, 5-J to 5-R, incl.).[2] Jove's testimony, of course, was the direct divulgence in court of the contents of tapped calls.

Under the law of New York, no conviction may be had on the uncorroborated evidence of an accomplice (New York Code of Criminal Procedure, Sec. 589). The trial court charged that Paris was an accomplice as a matter of law (2675), and that, unless the jury believed that the necessary corroboration was to be found in the wiretapping testimony of Patrolman Jove, they must acquit (2681-2, 2705).

Timely and specific objection was made to Jove's testimony on the ground that it violated the provisions of Section 605 of the Federal Communications Act. The objection was overruled and exception noted (1643-5).

Statutes Involved

The statutes involved are:

(1) Section 605, Federal Communications Act of 1934 (47 U. S. C., Sec. 605);

(2) New York Constitution, Article 1, Section 12;

(3) New York Code of Criminal Procedure, Section 813-a.

They are set forth in the Appendix to this Petition and Brief.

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2 References in parentheses, unless otherwise indicated, are to folios of the printed Record on Appeal in the State Court.

Question Presented:

Does the prohibition against divulgence of the contents of tapped telephone messages, contained in the Federal Communications Act, apply to the receipt of such evidence in State Courts, as well as in Federal Courts?

Reasons for the Allowance of the Writ

The broad policy of the Federal Communications Act, which makes it criminal to tap a telephone wire, or to divulge the contents of an intercepted telephone conversation, has been defined by this Court with undeviating consistency as operating to interdict the indirect use of wiretapping evidence for investigation, as well as direct testimonial use in court (*Nardone* v. *United States, supra,* 308 U. S. 338); its use by law enforcement agents as well as private citizens (*Nardone* v. *United States, supra,* 302 U. S. 379); and the tapping of intrastate as well as interstate telephone messages [*Weiss* v. *United States* (1939) 308 U. S. 321].

Yet, despite this clear exposition of the meaning of Section 605 of the Communications Act, the three State appellate courts which have passed on the question of the admissibility of wiretap evidence, apparently basing their decisions on the fortuitous circumstance that this Court's decisions in wiretapping cases arose, in each instance, on appeals from Federal court trials, have held that Section 605 is not applicable to State court trials, and that wiretap testimony may be received by State tribunals [New York: *Matter of Harlem Check Cashing Corp.* v. *Bell* (1946) 296 N. Y. 15; California: *People* v. *Kelley* (1942) 122 Pac. (2d) 655, affd. 22 Cal. (2d) 169; *People* v. *Vert-*

lieb (1943) 22 Cal. (2d) 193; *People* v. *Onofrio* (1944) 65 Cal. App. (2d) 584; *People* v. *Barnhart* (1944) 66 Cal. App. (2d) 714; MARYLAND: *Hitzelberger* v. *State* (1938) 174 Md. 152; *Rowan* v. *State* (1939) 175 Md. 547; *Hubin* v. *State* (1942) 180 Md. 279, cert. den. 316 U. S. 680].[3]

This Court has never heretofore passed on the question now presented, and, unless it does, the growing practice of wiretapping by State law enforcement agents, and the acceptance of their evidence in State courts, will continue. Moreover, an implication of tacit approval of the practice by this Court would inevitably ensue from a refusal to review the question which is squarely raised in the instant case for the first time.

Prayer

For the foregoing reasons, which are developed in more detail in the accompanying Brief, your petitioner prays that a *writ of certiorari* issue out of this Court to the Court of Appeals of the State of New York, commanding that Court to certify and to send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the proceedings below, to the end that the judgment of said Court be reviewed and determined by this Court; that the judgment and decision of the Court of Appeals be reversed; and that your peti-

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3 Examination of the papers on the petition for *certiorari* which was denied in the *Hubin* case, *supra*, 316 U. S. 680, reveals that the question presented by the instant case was not raised there.

tioner be granted such other and further relief as may be proper.

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Supreme Court of the United States

OCTOBER TERM 1948

No.

DAVID KRAKOWER,

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—against—

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN SUPPORT OF PETITION

POINT I

The Court of Appeals erred in holding that Section 605 of the Federal Communications Act did not forbid the receipt in evidence of wiretapped telephone calls.

The Court of Appeals rejected the contention that Section 605 of the Federal Communications Act applied to State courts, as well as to Federal courts, in its prohibition against the receipt in evidence of wiretapped telephone calls—both interstate and intrastate in character. In this, it manifestly erred.

A. *The adoption of Section 605 of the Federal Communications Act of 1934 outlawed the reception of wiretap evidence in State, as well as Federal, courts.*

Section 605 provides, in its "critical clause" (*Weiss* v. *United States, supra,* 308 U. S. 321, 327) that

> "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

Violation of this section is made a substantive crime (47 U. S. C., Sec. 501). It is not, moreover, a mere rule of evidence, applicable only to Federal courts, but it is an expression of the Congressional policy to outlaw unethical methods of gathering evidence. (*Weiss* v. *United States, supra,* 308 U. S. 321, 331; *Nardone* v. *United States, supra,* 302 U. S. 379, 383). As this Court wrote in the *Nardone* case, *supra* (302 U. S., at p. 383):

> "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."

This decision is the "translation into practicality of broad considerations of morality and public well-being" (*Nardone* v. *United States, supra,* 308 U. S. 338, 340).

If, as this Court has held (*Weiss* v. *United States, supra,* 308 U. S., at p. 331):

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"It is not too much to assume the interdiction of the statute was intended to prevent such a method of procuring testimony",[4]

then it must follow that all wiretapping, State as well as Federal, must have been banned. If the State courts, with their wide jurisdiction over crimes, are exempted from the operation of the statute, such methods of gathering evidence will flourish. Common sense indicates that no such schizoid approach to an essentially moral and ethical problem could have been intended.

"A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous motive." (*Nardone* v. *United States, supra,* 308 U. S., at p. 341)

See: Rosenzweig, *The Law of Wiretapping,* 33 Cornell L. Q., 77-78.

Accordingly, as a "remedial measure", Section 605 should be given a broad and liberal interpretation in aid of the worthy ends sought to be attained. [*Sablowsky* v. *United States* (C. C. A. 3d Cir. 1938) 101 Fed. (2d) 183, 190]

When Congress enacted the Federal Communications Act, beyond question it created a substantive law, within its powers, dealing with interstate commerce, and excluded

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4 In the last few years, despite a great increase in the number of crimes cognizable in Federal courts (35 *Journal of Crim. Law & Criminology,* 16 *et seq.*) the record of efficacy of Federal prosecutors operating without the aid of wiretapping has been impressive. The U. S. Attorney for the Southern District of New York reports 99.1% convictions in 1947; in the Eastern District of New York convictions in 1947 totalled 96% of trials; and in the Northern District of Illinois the percentage of convictions from July 1, 1946, to June 30, 1947, totalled 95.8%.

any further valid State action on the subject thereafter [*Oklahoma-Arkansas Tel. Co.* v. *Southwestern Bell Tel. Co.* (C. C. A. 8th Cir. 1930) 45 Fed. (2d) 995, 1000, cert. den. 283 U. S. 822].

Numerous analogies spring to mind, where Congress has enacted substantive legislation, and, despite the lack of express words making the law binding on State courts as well as Federal tribunals, such has been held to be the result, where a contrary conclusion would have, "to a large extent", defeated the "object of its enactment".[5]

Further ground for overriding the State court's unwarranted refusal to follow the policy laid down by the Federal statute is found in the Supremacy Clause—Article VI, Section 2—of the Federal Constitution.

See: *Francis* v. *Southern Pacific Co.* (1948) 333 U. S. 445, 450; *Testa* v. *Katt* (1947) 330 U. S. 386.

B. *The New York rule admitting illegally obtained evidence does not apply to wiretapping testimony.*

Nor can the People rely on the New York rule admitting illegally obtained evidence [*People* v. *Richter* (1943) 291 N. Y. 161; *People* v. *Defore* (1926) 242 N. Y. 13; *People* v.

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5 PROHIBITION AGAINST USE IN EVIDENCE OF STATEMENTS BY BANKRUPT [11 U. S. C. Sec. 25-a (10); *People* v. *Donnenfeld* (2d Dept. 1921) 198 App. Div. 918, affd. 233 N. Y. 526; *People* v. *Lay* (1916) 193 Mich. 17]; EXEMPTION OF INTERNAL REVENUE AGENTS FROM TESTIFYING IN REGARD TO OFFICIAL DUTIES [Sec. 3167, Rev. St. U. S.; *Boske* v. *Comingore* (1900) 177 U. S. 459]; FEDERAL EMPLOYERS LIABILITY ACT PROCEDURAL REGULATIONS [*Minn., St. Paul & Sault Ste. Marie Ry. Co.* v. *Moquin* (1931) 283 U. S. 520]; SUSPENSION OF STATUTES OF LIMITATION AS TO SOLDIERS [*Caperton* v. *Bowyer* (1871) 81 U. S. 216, 235; *Stewart* v. *Kahn* (1870) 78 U. S. 493, 505-506]; EXCLUSION OF UNSTAMPED DOCUMENTS FROM EVIDENCE [Act of Congress, July 13, 1866; Sec. 9; *Chartiers & Robinson Turnpike Co.* v. *McNamara* (1872) 72 Pa. 278, 281].

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Adams (1903) 176 N. Y. 351] to justify the receipt of the wiretapping testimony in this case, since testimony of wiretapped conversations is itself a Federal crime.

Thus, Section 605 makes it illegal—on pain of criminal sanctions (47 U. S. C., Sec. 501)—to "divulge" the contents of a tapped message. This Court has noted that the act of testifying as to the contents of a wiretap is itself a "divulgence" which constitutes a violation of the Communications Act (*Nardone* v. *United States, supra,* 302 U. S. 379, 382).

Certainly, there seems to be no sound reason why the criminally proscribed act of divulgence should be permitted in testimony in a State court, and prohibited in a Federal court. Should a State court judge be allowed to condone a Federal crime taking place in his very presence? Obviously not. [See: Note, 7 Fordham L. Rev. 263; Bernstein, *The Fruit of the Poisonous Tree: Civil Liberties and Wire Taps,* 37 Ill. L. Rev. 99, 107-108; Rosenzweig, *The Law of Wire Tapping,* 32 Cornell L. Q. 514, 546.][6]

C. The New York law—constitutional, statutory, and decisional—which purports to legalize supervised wiretapping is void, since it contravenes the Federal statute.

Finally, it is submitted that the New York Court of Appeals, in its decision in *Matter of Harlem Check Cashing Corp.* v. *Bell, supra,* 296 N. Y. 15—upon which it relied in the instant case—erred when it held that wiretap evidence gathered under the aegis of an *ex parte* order made pursuant to Section 813-a of the New York Code of Criminal Procedure and Article 1, Section 12 of the New York Constitution was admissible.

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6 At the 1938 New York Constitutional Convention, one of the delegates, in the debate on the adoption of Article 1, Section 12, pointed out that no State court judge should allow the Federal crime to take place in his courtroom (1 Revised Record, N. Y. State Const. Conv., pp. 550-551.)

The Court of Appeals wrote that it was "not persuaded" that the decision in *Weiss* v. *United States, supra,* 308 U. S. 321, constrained a holding that wiretap evidence, obtained on a court order made "in accordance with the statutes of the State as expressly authorized by the Constitution of the State" (296 N. Y., at p. 17), was illegal. The Court went on to say that, since the State had provided by Constitution and statute for "certain specific methods" of gathering wiretap evidence, it was not to be assumed that "Congress intended to circumscribe that power unless it unequivocally indicated such an intent".

The palpable error in that statement is the fact that Congress acted in 1934, *prior* to the State's adoption in 1938 of its Constitutional and statutory scheme for regulated wiretapping, and therefore the proffered canon of determining Congress' intent is inapplicable. As we have already shown, when Congress acted, it preempted the field, and the State, by *later* adopting its scheme, was doing a void thing, and running counter to the supreme law of the land.

CONCLUSION

The problem posed by this petition is of wide and important application. The clear intent of Congress to ban all wiretapping is being flouted every day by the receipt of such evidence in State courts, a result never intended by the lawmakers. The previous decisions of this Court should be implemented by one in this case to stop a dangerous break in the dike of civil liberties.

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A writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

FEDERAL COMMUNICATIONS ACT

Section 605 of the Federal Communications Act of 1934 (47 U. S. C. A. Sec. 605), insofar as relevant, reads as follows:

"Sec. 605. Unauthorzed publication or use of Communications

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or the benefit of another not entitled thereto; and no person having

received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *"

NEW YORK STATE CONSTITUTION

Article 1, Section 12, of the New York State Constitution provides as follows:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

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NEW YORK CODE OF CRIMINAL PROCEDURE

Section 813-a reads in this wise:

"An ex parte order for the interception of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. * * *"